STATE OF CALIFORNIA GRAY DAVIS, *Governor*

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June 13, 2003

Mr. Leonard Kaye
SB 90 Coordinator
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, California 90012

And Parties and Affected State Agencies

Re: **Request for Reconsideration of Prior Final Decision**
Crime Victim's Domestic Violence Incident Reports, CSM 99-TC-08
Los Angeles County, Claimant
Penal Code Section 13730 and Family Code Section 6228
Statutes of 1984, Chapter 1609
Statutes of 1995, Chapter 965
Statutes of 1999, Chapter 1022

Dear Mr. Kaye:

Enclosed is the staff recommendation for Item 2, Request for Reconsideration. This document replaces the one page executive summary that was sent to you earlier.

Please contact me if you have questions.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enclosure: Item 2: Request for Reconsideration
CC: Mailing List

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Hearing: June 19, 2003

ITEM 2

REQUEST FOR RECONSIDERATION of the Commission's Statement of Decision adopted May 29, 2003

Penal Code Section 13730,
As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965

Family Code Section 6228,
As Added by Statutes 1999, Chapter 1022

Crime Victims' Domestic Violence Incident Reports (99-TC-08)

Commission Chairperson, Requestor

Executive Summary

This is a request for reconsideration made by the Commission Chairperson to reconsider the Commission's decision adopted on May 29, 2003, on the *Crime Victims' Domestic Violence Incident Reports* test claim pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations.

Background

The *Crime Victims' Domestic Violence Incident Reports* legislation generally requires local agencies to provide a copy of the domestic violence incident report and face sheet to the victim of a domestic violence incident, free of charge, within specified time frames. The legislation further requires the local agency to maintain the incident reports and face sheets for five years.

On May 29, 2003, the Commission adopted a statement of decision partially approving this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:
>
> - Storing domestic violence incident reports and face sheets for five years. (Fam. Code, § 6228, subd. (e).)
>
> The Commission further concludes that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and

reconsideration should be granted. A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law. A supermajority of five affirmative votes is required to change a prior final decision.

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration. In this regard, the Commission has the following options:

> Option 1: The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present.
>
> Option 2: The Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration.
>
> Option 3: The Commission can take no action, which has the legal effect of denying the request.

Conclusion and Staff Recommendation

Staff recommends that the Commission approve this request, finding that reconsideration is appropriate to determine, at a subsequent hearing on the merits, if an error of law is present.

Option 1: The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present.

Option 2: The Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration.

Option 3: The Commission can take no action, which has the legal effect of denying the request.

The Commission's Decision

The Commission partially approved this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:
>
> - Storing domestic violence incident reports and face sheets for five years. (Fam. Code, § 6228, subd. (e).)
>
> The Commission further concludes that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

The Commission found that the activity of storing the reports for five years constituted a new program or higher level of service for the following reasons:

> Family Code section 6228, subdivision (e), states that the requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report. The claimant contends that subdivision (e) imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for five years. The Commission agrees.
>
> Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[7] *But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.*

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[7] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

(d) *Records less than two years old. . . .*(Emphasis added.)[9]

In 1980, the California Supreme Court decided a case, noting that under Government Code section 34090, the city council lacked the authority to approve destruction of records less than two years old.[10]

Staff finds that the finding in the statement of decision, that "the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence" and that "record retention policies were left to the discretion of the local agency," is not correct. Thus, the conclusion that storing domestic violence incident reports and face sheets for *five years* is a new program or higher level of service may constitute an error of law.

Conclusion and Staff Recommendation

Staff recommends that the Commission approve this request, finding that reconsideration is appropriate to determine, at a subsequent hearing on the merits, if an error of law is present.

[9] Government Code section 34090 was last amended by Statutes 1975, chapter 356.

[10] *People v. Zamora* (1980) 28 Cal.3d 88, 96, fn. 3.

H

THE PEOPLE, Plaintiff and Respondent,
v.
JOSEPH ANTHONY ZAMORA, Defendant and Appellant

Crim. No. 21063.

Supreme Court of California

Aug 28, 1980.

SUMMARY

Following a municipal court jury trial, defendant was convicted of battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148). Prior to trial, defendant's counsel made an informal request to the city attorney's office, which was prosecuting the case, for discovery of records relating to the four police officers involved. The city attorney agreed to produce records of any citizen complaints charging racial prejudice or excessive use of force against the officers, including names, addresses and telephone numbers of the complainants. The city attorney subsequently supplied the promised information as to one of the officers and informed defendant that no complaints had been filed against another of the officers. With respect to the remaining two officers, defendant was given only the names of complainants, without addresses or telephone numbers, and was told that no further information was available. At a pretrial hearing on a motion for discovery of the complaint records, the prosecution revealed for the first time that all records of unsustained citizen complaints against police officers from 1949 through 1974 had been destroyed in May 1976, about two weeks prior to defendant's arrest. Such destruction was accomplished pursuant to a city council resolution approving requests for destruction of a variety of city records, including miscellaneous police records, through 1974. Concluding that the destruction had not been malicious or perpetrated in bad faith, the municipal court declined to impose sanctions on the prosecution. (Municipal Court for the Los Angeles Judicial District of Los Angeles County, No. 31546058, Michael T. Sauer and Mary E. Waters, Judges.)

The Supreme Court reversed. Rejecting contentions that the records had been lawfully destroyed pursuant to the city council resolution and ***89** established administrative procedures, and not with the specific purpose of violating defendant's rights, the court held that such destruction had deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, and that the failure to impose sanctions upon the prosecution was prejudicial error. The court also held that the appropriate sanction was an instruction to the jury that the officers at issue had used excessive or unnecessary force on each past occasion when complaints had been filed against them, but that complaint records were later destroyed, along with an instruction that the jury could rely upon that information to infer that the officers were prone to use excessive or unnecessary force and that the officers' testimony regarding incidents of alleged police force might be biased. (Opinion by Tobriner, J., with Mosk and Newman, JJ., concurring. Separate concurring and dissenting opinion by Manuel, J., with Clark and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Bird, C. J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Evidence § 9--Judicial Notice--Matters Subject to Notice--Court Records and Documents Admitted in Evidence in Other Cases.
On appeal from convictions for battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148), in which the issue was what sanctions, if any, were appropriate for the city attorney's destruction of unsustained citizen complaints against police officers through 1974, the reviewing court declined to take judicial notice of specified case records and documents concerning destruction of the complaint files that had been discovered and admitted into evidence in other cases, since such documents and court files related to evidentiary matters which should have, but were not, presented to the trial court in the instant prosecution.

(2) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Citizen Complaints Against Police Officers-- Destruction--Pursuant to Statutory Authority.
In a prosecution for battery on a police officer (Pen. Code, § § 242, 243), and ***90** resisting an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen

that the officers involved had used excessive or unnecessary force on past occasions, the trial court's failure to impose the sanction of an adverse finding that the officers had used excessive or unnecessary force on each past occasion when complaints had been filed against them constituted prejudicial error, where the evidence presented at trial was closely balanced, and where it could be presumed that the jury had discounted the testimony of defendant's witnesses, all of whom were friends or relatives. Access to the destroyed complaint files might have enabled defendant to call favorable witnesses who did not have such an obvious interest in the outcome of the trial.

COUNSEL

Irwin Siegel for Defendant and Appellant.

Quin Denvir, State Public Defender, Charles M. Sevilla, Chief Assistant State Public Defender, Wilbur F. Littlefield, Public Defender (Los Angeles), Dennis A. Fischer and Robert Berke, Deputy Public Defenders, A. Wallace Tashima, Tracy S. Rich and Morrison & Foerster as Amici Curiae on behalf of Defendant and Appellant.

John K. Van de Kamp, District Attorney, Harry B. Sondheim, Donald J. Kaplan and Richard W. Gerry, Deputy District Attorneys, for Plaintiff and Respondent.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Norman H. Sokolow, Acting Assistant Attorney General, Howard J. Schwab and Carol Wendelin Pollack, Deputy Attorneys General, Burt Pines, City Attorney (Los Angeles), George C. Eskin, Chief Assistant City Attorney, Rand Schrader, Laurie Harris and S. Thomas Todd, Deputy City Attorneys, as Amici Curiae on behalf of Plaintiff and Respondent. *93

TOBRINER, J.

Defendant appeals from convictions for battery on a police officer (Pen. Code, § § 242, 243) and resisting an officer in the discharge of his duties (Pen. Code, § 148). About two weeks before defendant's arrest in May of 1976, the Los Angeles City Attorney's office directed the destruction of all past records through 1974 of citizen complaints against police officers, excepting only complaints found meritorious by police investigation. As we shall explain, we have determined that the destruction of unsustained citizen complaints was entirely improper, and that such destruction deprived defendant of the opportunity to locate witnesses who could testify that on past occasions the officers involved in his case had used excessive or unnecessary force. [FN1] We therefore conclude that the trial court erred in failing to impose sanctions upon the prosecution.

FN1 Unsustained complaints are discoverable as well as sustained complaints. (*Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231, 240 [142 Cal.Rptr. 266]; *Kelvin L.* v. *Superior Court* (1976) 62 Cal.App.3d 823, 829 [133 Cal.Rptr. 325].)

In deciding the appropriate sanction in the present case we examine and weigh three considerations. First, we note that although the record indicates that complaint records were destroyed improperly, and with the knowledge that such records were subject to defense discovery, such destruction does not suffice to prove that the police or city attorney acted in bad faith. Second, the destroyed records are not material evidence, but merely a possible source through which defendants might discover witnesses to impeach the testifying officers. Third, although a sanction should be severe enough to deter improper destruction of records, the sanction of dismissal urged by the defendant would result in the unfortunate consequence that an officer named in a destroyed complaint could be assaulted or resisted with impunity. These considerations lead us to conclude that a severe sanction should be imposed but that dismissal of the charges against defendant would be too drastic.

We therefore believe that the correct sanction in this case is that proposed by Presiding Justice Klein in her opinion for the Court of Appeal: the trial court should instruct the jury (a) that the officers in question used excessive or unnecessary force on each occasion when complaints were filed against them but that the complaint records later were destroyed, and (b) that the jury may rely upon that information to infer that the officers are prone to engage in excessive or unnecessary force (see Evid. Code, § 1103) and that the officers' testimony regarding incidents *94 of alleged police force may be biased (see Evid. Code, § 1101, subd. (c)). The failure of the trial court to impose this or any sanction upon the prosecution in the present case constitutes reversible error.

May 3, 1976, appears to violate this statute by authorizing destruction of records through the end of 1974. It is not clear, however, whether any records less than two years old were actually destroyed.

(1) During the pendency of the present appeal, defense counsel in other cases developed additional facts and obtained further documents concerning the destruction of the complaint records. The Los Angeles County Public Defender, appearing here as amicus curiae, has asked us to take judicial notice of the records in three such cases and of a number of documents discovered and admitted into evidence in other cases. The People oppose our taking judicial notice on the ground that the requested documents and court files relate to evidentiary matters which should have been presented to the trial court. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [138 Cal.Rptr. 828]; *People* v. *Superior Court (Mahle)* 3 Cal.App.3d 476, 482, fn. 3 [83 Cal.Rptr. 732].) Although we regret that we must thus decide the present appeal upon a record less complete than that developed in later cases, we find the People's position viable and decide that we should not take judicial notice of matters which should have been, but were not, presented to the trial court.

2. *The municipal court erred in failing to impose sanctions on the prosecution for the destruction of complaint records.*

"[T]he intentional suppression of material evidence favorable to a defendant who has requested it constitutes a violation of due process, irrespective of the good or bad faith of the prosecution." (*People* v. *Hitch* (1974) 12 Cal.3d 641, 645 [117 Cal.Rptr. 9, 527 P.2d 361]; *Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782, 786 [144 Cal.Rptr. 418].) Although complaint records themselves may not be material evidence, the defendant is entitled to discovery of such records because they may lead to evidence admissible under Evidence Code section 1103. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538 [113 Cal.Rptr. 897, 522 P.2d 305].) Consequently, courts have not hesitated to conclude that the suppression or destruction of discoverable complaint records also constitutes a violation of due process. (See *Dell M. v. Superior Court, supra*, 70 Cal.App.3d 782, 786.) The court must impose appropriate sanctions in such a case in order to uphold defendant's right to a fair trial and to deter prosecution attempts to defy or circumvent judicial authority.

The prosecution does not dispute the fact that the city attorney's office destroyed complaint records, and that the destruction of the records deprived defendant of the opportunity to locate witnesses who might ***97** testify concerning the officers' past use of excessive or unnecessary force. Seeking to avoid the imposition of sanctions which would ordinarily follow from such undisputed facts, the prosecution argues that the records were lawfully destroyed pursuant to a resolution of the Los Angeles City Council and established administrative procedures, and not with the specific purpose of violating the rights of defendant Zamora. [FN4] As we shall explain, the prosecution's arguments cannot stand analysis.

FN4 The People contend that defendant's discovery request was overbroad and did not show sufficient cause for discovery; they further argue that production of the names of complainants sufficiently complied with the request and production of addresses would be useless. The Court of Appeal properly rejected all these contentions. Its opinion notes: "The People ... did not question the sufficiency of defendant's discovery request in the court below or demand that a formal motion be made, but instead expressly agreed to provide the names and addresses of the pertinent complainants. Since defendant was thus led to believe that his discovery request would be complied with without a further showing on his part, it would be manifestly unfair at this late stage to give consideration to the People's criticisms of that request. (Cf. *Kelvin L. v. Superior Court, supra*, 62 Cal.App.3d 823, 827 [133 Cal.Rptr. 325]; see *People* v. *McManis* (1972) 26 Cal.App.3d 608, 617-618 [102 Cal.Rptr. 889], regarding compliance with informal discovery requests.)

"Further, since the prosecution's agreement to comply with defendant's discovery request included an express promise to supply the addresses of the citizen complainants, the People will likewise not be heard to argue now that the production of some of the complainants' names alone was sufficient for compliance or that the missing addresses would, in all probability, have been useless to the defense because of their ages. We note only that even if a substantial

imposition of sanctions. Our decision in *Pitchess* establishing the right of defendants to discover citizen complaints necessarily implies a duty on the city's part to retain such records for a reasonable period of time. (See *Pope, supra*, at p. 799; cf. *People v. Nation* (1980) 26 Cal.3d 169, 175 [161 Cal.Rptr. 299, 604 P.2d 1051].) The purpose underlying that obligation is to protect the discovery rights of persons involved in altercations with the police. We drew no distinction in *Pitchess* between persons who had already been involved in such altercations and those who might be involved in the future; we make no such distinction here; the destruction of records involved in this case equally violates the discovery rights of both classes of defendants. Redress of that violation requires the imposition of appropriate sanctions by the trial court.

(5) 3. *An instruction to the jury relating the destruction of the complaint records to the officers' testimony is the appropriate sanction in the present case.*

Defendant argues that the only appropriate sanction in the present case is dismissal of all charges against him. The People, on the other hand, relying on the trial court's failure to find bad faith, urge that only minimal sanctions or none at all be imposed. As we explain, in our view, this case, falling between the two positions, calls for a severe sanction but one short of dismissal of the charges.

We first observe that the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence. "[N]ot every suppression of evidence requires dismissal of charges. ... The remedies to be applied need be only those required to assure the defendant a fair trial." (*Brown v. Municipal Court* (1978) 86 Cal.App.3d 357, 363 [150 Cal.Rptr. 216]; see *Dell M. v. Superior Court, supra*, 70 Cal.App.3d 782, 788.) [FN7] ***100**

FN7 Courts and Legislatures have displayed considerable flexibility in devising remedies fashioned to the facts of each particular case. In *People v. Hitch, supra*, 12 Cal.3d 641, failure of the police to preserve a breath ampoule led not to dismissal of the charges, but rendered the breath alcohol test inadmissible. In *Brown v. Municipal Court, supra*, 86 Cal.App.3d 357, police refusal to allow a defendant to take a blood alcohol test rendered inadmissible a breath alcohol test favorable to the prosecution. In *Giglio v. United States* (1972) 405 U.S. 150 [31 L.Ed.2d 104, 92 S.Ct. 849], the prosecution concealed a promise of immunity to a witness; the court ordered a new trial in which the evidence was disclosed. Finally, under Evidence Code section 1042, prosecution assertion of a privilege of nondisclosure results in an adverse finding "upon any issue in the proceeding to which the privileged information is material."

Review of prior cases suggests the factors that guide the exercise of that discretion. First, "the imposition and mode of sanctions depends upon the particular circumstances attending such loss or destruction." (*People v. Hitch, supra*, 12 Cal.3d 641, 650 [117 Cal.Rptr. 9, 527 P.2d 361].) Thus lawful and proper destruction requires no sanction (*Pope, supra*, 83 Cal.App.3d 795; *Robinson v. Superior Court, supra*, 76 Cal.App.3d 968); illegal and malicious suppression of evidence may result in dismissal (see *People v. Mejia* (1976) 57 Cal.App.3d 574 [129 Cal.Rptr. 192]; *Dell M. v. Superior Court, supra*, 70 Cal.App.3d 782).

Second, the sanction depends on the materiality of the evidence suppressed. In *Hitch*, for example, we noted that bad faith destruction of evidence which might conclusively demonstrate innocence could require dismissal. (12 Cal.3d 641, 653, fn. 7.) Suppression of evidence which might impeach a witness for bias, however, may result in a new trial instead of a dismissal (*Giglio v. United States, supra*, 405 U.S. 150); suppression of evidence immaterial to the charge invokes no sanction (see *Dell M. v. Superior Court, supra*, 70 Cal.App.3d 782, 788).

Finally, the courts must consider the impact of the sanction upon future cases and future police conduct. If a sanction is to deter suppression of records and evidence, it must contain a punitive element; it must outweigh the benefit that the prosecution gains from the suppression. At the same time the court must bear in mind the public interest in law enforcement, and the harm which may be inflicted by a sanction which prevents the trial and conviction of possibly guilty future defendants.

We examine the record in the present case in light of the foregoing considerations, looking first at the circumstances of the destruction of the records. Two

are attorneys, a state bar inquiry would also be possible. Such penal and administrative sanctions would single out those actually responsible for the destruction of the records, without endangering the officers named in the complaints or impairing the public interest in the trial of persons accused of crime. The administrative sanctions might be more effective in deterring future conduct than would the dismissal of criminal charges.

For the foregoing reasons, we conclude that the appropriate sanction is that set out in the opinion of the Court of Appeal. According to that opinion, upon remand of this case, the court should instruct the jury that Officers Soelitz and Schroyer used excessive or unnecessary force on each occasion when complaints were filed against those officers, but ***103** that the complaint records later were destroyed. [FN10] The court should also instruct the jury that they may rely upon that information to infer that the officers were prone to use excessive or unnecessary force (see *Kelvin L. v. Superior Court, supra*, 62 Cal.App.3d 823, 831) and that the officers' testimony regarding incidents of alleged police force may be biased. (Cf. *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212, 221-222 [146 Cal.Rptr. 390].)

> FN10 Because we do not believe the city council intentionally authorized the destruction of any complaint records, we draw no distinction between records which could have been lawfully destroyed pursuant to a resolution conforming to Government Code section 34090 and those which could not lawfully be destroyed.

In our opinion, the sanction of a jury instruction will adequately redress the actual harm done to defendant by the destruction of the complaints. It will not, of course, provide him with a live witness who can testify to past police misconduct. The instruction, however, substantially favors defendant in other respects. First, it assumes that the destroyed records would have led defendant to favorable evidence; in reality, defendant might not have been able even to locate the witnesses identified in the records or, if he had found them, the resulting testimony might have proven useless. Second, the instruction deprives the prosecution of the opportunity to rebut the evidence of past misconduct by the officers. Finally, it prohibits the jurors from rejecting such evidence, although in the absence of the instruction such rejection would have been their prerogative.

We would thus tailor the sanction to compensate for the exact wrong done; we would attempt to remedy the harm to the victims by giving them the approximate equivalent of the destroyed records of the complaints. We prefer this redress to the imposition on the officers of the drastic penalty of denial of current and future defenses.

(6) 4. *The trial court's failure to impose the sanction of an adverse finding constitutes prejudicial error.*

With respect to this point we adopt the opinion of the Court of Appeal. It explained that: "The evidence presented at trial was closely balanced, as is reflected in the fact that defendant's two codefendants both escaped conviction .... Indeed, the trial was essentially reduced to a credibility contest in which the testimony of the arresting officers was to be weighed against that of defendant and his witnesses. Since all of the witnesses who testified on defendant's behalf were either friends ***104** or relatives, it can be presumed that the jury discounted their testimony because of apparent bias. Access to the now destroyed complaint files may very well have enabled defendant to call favorable witnesses who did not have such an obvious interest in the outcome of the trial. That defendant was deprived of a fair trial by virtue of the absence of appropriate sanctions is accordingly manifest." [FN11]

> FN11 "The People assert that whatever error occurred below should be assessed against the 'miscarriage of justice' standard explicated in *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. But since suppression of evidence constitutes a violation of a defendant's due process rights (*People v. Hitch, supra*, 12 Cal.3d 641, 645; *People v. Kiihoa* (1960) 53 Cal.2d 748, 752 [3 Cal.Rptr. 1, 349 P.2d 673]), it would appear that the proper test to be employed here is that enunciated in *Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710- 711, 87 S.Ct. 824, 24 A.L.R.3d 1065] for errors of a constitutional nature. (See *People* v. *Ruthford* (1975) 14 Cal.3d 399, 408 [121 Cal.Rptr. 261, 534 P.2d 1341].) Actually, with respect to the case at bench, the distinction between the two tests is of no significance since the error in question could not be considered harmless under either." (Fn. by the Court of Appeal.)

opinion. However, I respectfully disagree with the reasoning of the lead opinion since it would effectively foreclose dismissal as a sanction in any case which involved the wholesale destruction of discoverable evidence. As a result, the lesson the police will draw from this decision is that if they maliciously destroy all the records which contain discoverable materials at one time, they do not have to fear any sanctions or reprisals. However, if they refuse on a case by case basis to disclose discoverable records, they face the possibility of dismissal of their case and contempt of court. (See *Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782 [144 Cal.Rptr. 418].) I cannot join in reasoning that sanctions such an illogical result.

Respondent's petition for a rehearing was denied October 16, 1980. Clark, J., Richardson, J., and Manuel, J., were of the opinion that the petition should be granted. ***107**

Cal.,1980.

People v. Zamora

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